

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY ADER,

Plaintiff-Appellant,

v

DELTA COLLEGE BOARD OF TRUSTEES,

Defendant-Appellee.

UNPUBLISHED

April 21, 2015

No. 320096

Saginaw Circuit Court

LC No. 08-001822-CZ

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Plaintiff, Timothy Ader, appeals as of right an order granting defendant, Delta College Board of Trustee's motion for summary disposition on plaintiff's amended complaint, entered on January 7, 2014, and an order granting defendant summary disposition on plaintiff's complaint, entered on May 20, 2013, in this action regarding defendant's alleged violations of the Open Meetings Act (OMA), MCL 15.261 *et seq.* We affirm.

On June 21, 2008, plaintiff filed a complaint against defendant regarding alleged violations of the OMA. At that time, there was a pending lawsuit by a defendant board member, Kim Higgs, against defendant. Plaintiff claimed that on June 10, 2008, defendant improperly allowed Higgs and Higgs's attorney into a closed meeting with defendant and its attorney to discuss the pending lawsuit, which violated the OMA. The trial court initially dismissed plaintiff's complaint based on standing, and after a lengthy appellate process, it was determined that plaintiff had standing and the decision was reversed and the case was remanded. *Ader v Delta College Bd of Trustees*, 488 Mich 1025; 792 NW2d 335 (2011); *Ader v Delta College Board of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2011 (Docket No. 290583). After remand, defendant filed a motion for summary disposition, which the trial court granted. Plaintiff amended his complaint to add additional allegations. Defendant then filed a motion for summary disposition on plaintiff's amended complaint, which the trial court also granted. Plaintiff appeals both orders.

Plaintiff argues that the trial court erred in granting defendant's first¹ motion for summary disposition. Plaintiff asserts that the trial court erred in finding (1) that injunctive relief was improper because future violations of the OMA by defendant were speculative; (2) that the court lacked subject matter jurisdiction because there was no actual controversy pursuant to MCR 2.605; and (3) that defendant did not violate the OMA. We agree that the trial court erred in finding that it was unable to order injunctive relief or a declaratory judgment based on plaintiff's allegations, but disagree that defendant violated the OMA.

The trial court granted defendant's first motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). We review decisions on motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id.* "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* Further, issues of statutory interpretation are reviewed de novo. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). A statute should be interpreted according to its plain and ordinary meaning. *Id.*

Pursuant to the OMA, public bodies, such as defendant, must conduct their meetings and make all deliberations and decisions in a meeting open to the public. MCL 15.263. There are three tiers of enforcement for private litigants. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 135; 860 NW2d 51 (2014). MCL 15.270(1) permits individuals to file a civil suit to challenge the validity of a decision of the public body. *Id.* MCL 15.271 allows an individual to seek to compel compliance or to enjoin further noncompliance with the OMA. *Id.* Finally, MCL 15.273 permits an award of actual or exemplary damages for intentional violations of the OMA. *Id.* at 136. In addition, MCR 2.605 sets forth the requirements for obtaining a declaratory judgment, which is not a form of relief specifically provided for by the OMA. *Id.* at 136 n 31. In his initial complaint, plaintiff requested injunctive relief and a declaratory judgment in relation to defendant's actions at the June 10, 2008 meeting.

First, we address plaintiff's request for injunctive relief. MCL 15.271 provides that "[i]f a public body is not complying with this act . . . a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act." Defendant argues that MCL 15.271 requires ongoing noncompliance with the OMA, which plaintiff did not show. Defendant relies primarily on the language in the statute that states an action may be filed if a public body is "not complying with this act." We do not agree with defendant's reading of the statute. The statute provides that if a public body is not complying with the act, a person may commence an action. At the time the complaint was filed, the Higgs lawsuit was ongoing. Thus, assuming that defendant violated the OMA, there was arguably an ongoing violation at the time the action was filed. Our reading of the statute would therefore not preclude injunctive relief for plaintiff on that ground.

¹ For the purposes of this opinion, we refer to defendant's January 29, 2013 motion as its first motion for summary disposition and we refer to defendant's July 30, 2013 motion as its second motion for summary disposition.

Defendant also argues, and the trial court held, that plaintiff's request was hypothetical and speculative, and, thus, did not merit injunctive relief. Indeed, "[i]njunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003) (quotation omitted). Consequently, "[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." *Nicholas v Meridian Twp Charter Bd*, 239 Mich App 525, 533; 609 NW2d 574 (2000), overruled on other grounds by *Speicher*, 497 Mich 125. "Where there is no reason to believe that a public body will deliberately fail to comply with the OMA in the future, injunctive relief is unwarranted." *Id.*

In application to this case, we disagree with the trial court's holding. The trial court found that plaintiff's claim was related exclusively to the Higgs case, and because the Higgs case had settled, the possibility of future violations was hypothetical. Our review of the record and overall impression was that plaintiff requested that defendant be enjoined from all future OMA violations of this kind, irrespective of the Higgs case. In addition, this situation is distinguishable from *Nicholas*, because defendant does not acknowledge its alleged violation of the OMA, so it is possible defendant would behave in the same manner in the future. Thus, we conclude that it is necessary to address the merits of the OMA violation in relation to plaintiff's claim pursuant to MCL 15.271.

Second, we address plaintiff's request for declaratory relief. MCR 2.605 provides:

In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

Defendant asserts, and the trial court found, that there was no actual controversy pursuant to MCR 2.605 justifying declaratory relief. Case law indicates that the existence of an actual controversy pursuant to MCR 2.605 implicates both subject-matter jurisdiction and standing. A litigant must meet the requirements of MCR 2.605 in order to seek a declaratory judgment. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 373; 792 NW2d 686 (2010). While plaintiff had standing pursuant to Section 11 of the OMA, MCL 15.271,² plaintiff's lawsuit requested a declaratory judgment, so it must meet the requirements of MCR 2.605. *Id.*

Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand)*, 293 Mich App 506, 515; 810 NW2d 95 (2011) (citation omitted). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Id.* at 515, citing *Citizens for Common Sense in Gov't v*

² MCL 15.271 "allows an individual to commence a civil action for injunctive relief to either compel compliance with the OMA or enjoin further noncompliance with the act." *Detroit News, Inc v Detroit*, 185 Mich App 296, 300; 460 NW2d 312 (1990).

Attorney Gen, 243 Mich App 43, 55; 620 NW2d 546 (2000). “The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised.” *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) (citation and internal quotation marks omitted). “Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist.” *Citizens for Common Sense*, 243 Mich App at 55.

We disagree with the trial court’s holding that plaintiff failed to plead an actual controversy. The court reasoned that the Higgs lawsuit had settled, and any future OMA violations were merely hypothetical. In viewing the pleadings in a light most favorable to plaintiff, we conclude that plaintiff sought to declare defendant’s policy of meeting with opposing litigants improper, in relation to the Higgs lawsuit and other potential lawsuits filed against defendant. Given defendant’s position that it did not violate the OMA, it seems that this situation could arise in the future, especially given the fact that several subsequent lawsuits, including this one, have been filed against defendant. Therefore, an actual controversy exists, and we will decide this issue based on the merits.

Third, we address whether defendant violated the OMA. The OMA requires that meetings and decisions of a public body be open to the public. MCL 15.263(1), (2). MCL 15.268 provides the circumstances under which a public body may meet in a closed session. Plaintiff alleges that on June 10, 2008, defendant held an improper closed session, while defendant asserts that MCL 15.268(e) applied and allowed defendant to meet in closed session. MCL 15.268(e) provides that a public body may have a closed meeting “[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigation or settlement position of the public body.” The crux of the parties’ dispute revolves around whether an open meeting with an opposing litigant would have “a detrimental financial effect on the litigation or settlement position of the public body.”³

There appears to be very little legal analysis relating to this exception. The parties refer only to a few sources of support. In support of his claim, plaintiff refers to *Manning v City of East Tawas*, 234 Mich App 244, 251; 593 NW2d 649 (1999), overruled on other grounds by *Speicher*, 497 Mich 125, where the Court held that the purpose of MCL 15.268(e) was to allow a public body to prepare for litigation “without having to broadcast its trial or settlement strategy to the opposition along with the rest of the general public.” Defendant similarly relies on *Manning*, and also refers to *Willis v Deerfield Twp*, 257 Mich App 541; 669 NW2d 279 (2003). In *Willis*, the plaintiff argued that the defendant board held an improper closed meeting; the defendant board justified the closed meeting pursuant to MCL 15.268(e). *Id.* at 549-550. In response, the plaintiff asserted that the lawsuit pending against the defendant was not for

³ Both parties seem to agree, in general, that defendant was permitted to invite private citizens into the meeting. See OAG, 1979-1980, No 5532, p 324 (August 7, 1979). The thrust of plaintiff’s argument is not whether Higgs was allowed in the meeting but whether the purpose of the closed meeting was improper with Higgs in the meeting.

monetary damages, so could not have a detrimental financial effect. *Id.* at 551. This Court disagreed, and adopted the trial court's holding that "[e]xpenditures to defend the litigation would be incurred even if a verdict did not result in a financial loss." *Id.* The Court further reasoned that the "defendant board may have discussed the likelihood of success on the merits of the case but, in light of the cost of defending against the litigation, concluded that it was best to settle the lawsuit despite the likelihood of an outcome in its favor." *Id.*

We disagree with plaintiff's conclusory assertion that the presence of any opposing litigant in a closed meeting precludes detrimental financial effect on the litigation or settlement position of a public body. Plaintiff's interpretation is far too narrow. Plaintiff fails to acknowledge that in *Manning*, the Court held that the purpose of MCL 15.268(e) was to allow a public body to prepare for litigation "without having to broadcast its trial or settlement strategy to the opposition *along with the rest of the general public.*" *Manning*, 234 Mich App at 251 (emphasis added). It seems clear that there may be detrimental financial effect from having litigation or settlement strategy broadcast to the public. To require a public body to conduct all settlement discussions in an open meeting could certainly have a detrimental financial effect on the litigation strategy of a public body because, as the Court in *Manning* acknowledged, any member of the public could then know defendant's settlement position, which may affect future lawsuits filed against defendant. In addition, negotiations constitute trial or settlement strategy, especially in light of expenditures incurred by extended litigation, as acknowledged by the Court in *Willis*. See *Willis*, 257 Mich App at 551. Plaintiff's unsupported allegation that negotiations do not constitute litigation or settlement strategy and may not take place in a closed session is, once again, conclusory and unsupported. Further, we agree with defendant's assertion that it may obtain information from an opposing litigant in the context of a closed meeting in order to develop its trial or settlement strategy. Preventing a public body from meeting in a closed session with its attorney and opposing litigant in all circumstances would seriously limit the exception in a manner not prescribed by the legislature. For these reasons, we conclude that there was no violation of the OMA.

Plaintiff argues that the trial court erred in granting defendant's second motion for summary disposition and finding that the additional allegations in plaintiff's amended complaint did not arise out of the same conduct, transaction, or occurrence, and were time barred. We disagree. Again, trial court decisions on motions for summary disposition are reviewed de novo. *Maiden*, 461 Mich at 119.

After the trial court granted defendant's initial motion for summary disposition, plaintiff amended his complaint to include additional allegations. The amended complaint elaborated on the allegations made regarding the June 10, 2008 meeting. Given our decision that defendant did not violate the OMA at the June 10, 2008 meeting, it is unnecessary to consider plaintiff's added allegations regarding that meeting. Plaintiff also added allegations that defendant violated the OMA at a May 13, 2008 meeting. Essentially, plaintiff alleged that defendant entered a closed session and never came back into open session before adjourning the meeting. According to plaintiff, defendant violated the OMA because it adjourned the May meeting in closed session, which is a decision that must be made in open session. MCL 15.263. Plaintiff sought to invalidate that decision, in addition to requesting injunctive and declaratory relief. Plaintiff did not raise any allegations regarding the May 13, 2008 meeting until his amended complaint was

filed on June 18, 2013, years after the initial complaint was filed. Defendant argues, and the trial court found, that the allegations regarding the May 13, 2008 meeting were time barred.

MCR 2.118(D) provides that “[a]n amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.” Plaintiff claims that his allegations in the amended complaint relate back to the original complaint because they arise out of the same conduct, transaction, or occurrence—defendant violating the OMA. We disagree. The allegations regarding the May 13, 2008 meeting relate to a separate and distinct violation of the OMA than plaintiff alleges occurred on June 10, 2008, which amounts to separate conduct. Additionally, the allegations relate to a meeting never mentioned in the original complaint, so it is a different transaction and occurrence. An action to invalidate a decision of a public body must be filed within 60 days after the approved minutes are available. MCL 15.270(3)(a). Moreover, actions alleging intentional violations of the OMA must be filed within 180 days of the alleged violation. MCL 15.273(2). Therefore, the additional allegations contained in plaintiff’s amended complaint were time barred, and the trial court correctly granted summary disposition on this issue.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood
/s/ Michael F. Gadola